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In The
Supreme Court Of The United States

OCTOBER TERM, 1982

No._____

RALPH POMPANO
Petitioner

v.

MICHAEL SCHIAVONE & SONS INC., and REVISED PENSION PLAN OF MICHAEL SCHIAVONE & SONS INC.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 8, 1982

QUESTIONS PRESENTED

1. Whether Congress Intended To Protect Pensioner's Right to Select the Manner of His Pension Payments Under the Employment Retirement Income Security Act of 1974, 29 U.S.C. §1022(a)?

2. Whether Congress Required Employers Fully and Accurately to Disclose Restrictions on Pension Benefits Under the Employment Retirement Income Security Act of 1974, 29 U.S.C. §1022(b)?

3. Whether A Retired Pensioner Had a Right to A Hearing and A Written Statement of Reasons for the Denial of His Lump Sum Pension Payment Under the Employment Retirement Income Security Act of 1974, 29 U.S.C. §1133?

4. Whether A Retired Pensioner Had A Right to Challenge Procedural Irregularities of the Pension Committee Under the Employment Retirement Security Act of 1974, 29 U.S.C. §1132(a)?

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Ralph Pompano respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 4, 1982.

OPINION BELOW

The opinion of the Court of Appeals, reported at 680 F.2d 911, appears in the Appendix beginning at page 1A. The denial of petitioner's timely petition for rehearing with a suggestion for rehearing *in banc* appears in the Appendix beginning at page 19A. The opinion of the United States District Court for the District of Connecticut, Burns, J., appears in the Appendix beginning at page 20A.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 4, 1982. A timely petition for rehearing with a suggestion for rehearing *in banc* was denied on July 14, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

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STATEMENT OF THE CASE

Ralph Pompano worked continuously for Michael Schiavone & Sons Inc. from 1935 until January 1, 1976, when he retired. App. p. 21A. As a retired company employee Mr. Pompano was entitled to certain pension payments from the Revised Pension Plan of Michael Schiavone and Sons, Inc., dated March 1, 1972. *Id.*

The Schiavone plan summary disclosed the availability of a lump sum pension payment to all retirees subject to the pension committee's approval. App. p. 13A. In truth, however, under an "unwritten general rule" long-term employees were ineligible for the lump sum payment. *Id.* This ineligibility appears nowhere in the plan summary. App. pp. 13A, 14A.

The lump sum pension payment was a one-time cash payment equal to the present value of the other pension plan options. App. p. 22A. Petitioner intended to invest the one-time payment to provide more income than he would receive in monthly payments under the pension plan. App. p. 23A.

This dispute arose after the respondents orally denied Mr. Pompano's request based on the undisclosed "unwritten general rule." App. pp. 3A, 15A. The pension committee gave no written statement of the reasons for the denial, App. p. 15A; nor were notes kept of the Pension Committee's meeting on the request. App. pp. 15A-18A. The pension committee did not appoint a secretary to keep any records; nor did the committee establish any procedure to review its decision short of litigation. App. p. 17A.

Mr. Pompano initiated this action in the United States District Court for the District of Connecticut, claiming violations of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA") 29 U.S.C. §1001 *et seq.* Federal jurisdiction is provided by 29 U.S.C. §1132(e)(1).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT CONCERNING CONGRESSIONALLY MANDATED DISCLOSURE STATUTES SUCH AS TITLE 29 U.S.C. §1022.

Section 1022(a) of Title 29 requires that a pension plan summary be

> "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."

Section 1022(b) requires a plan summary to describe all the

> "circumstances which may result in disqualification, ineligibility, or denial of benefits . . ."[1]

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[1]The full scope of the Congressional disclosure policy is further expressed in the regulations. Regulation §2520.102-2(b) provides in part that

> "the summary plan description must not have the effect to [sic] misleading, misinforming or failing to inform participants and beneficiaries. [Any] exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized . . ." 29 C.F.R. §2520.102-2(b). See also 29 C.F.R. §2520.102-3(t)(1).

The summary must "clearly identify circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or

As explained in Judge Mansfield's dissenting opinion:

> The Schiavone plan summary stated that the lump sum payment option was available to all participants subject to the Committee's approval. In reality, however, under the "unwritten general rule" long-termers and retirees were ineligible for the option. This ineligibility appears nowhere in the plan summary. App. pp. 13A, 14A. 680 F.2d at 918.

The narrow reading given Title 28 U.S.C. Sections 1022(a) and (b) by the majority below

> cannot be squared with other provisions of the Act, regulations promulgated thereunder, and Congress' intent. Section 2(b) of the Act declares that the "policy of this Act" is to require "the disclosure and reporting to participants and beneficiaries of *financial and other information* with respect to the plans," 29 U.S.C. §1001 (emphasis added), and §102(a)(1) of the Act requires the summary to be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. §1022(a). These unqualified statements of a broad disclosure requirement reflect Congress' desire to ensure "that the individual participant *knows exactly where he stands* with respect to the plan." H.R. Rep. No. 93-533, 93d Cong., 1st Sess. *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4649 (emphasis added). App. p. 14A. 680 F.2d at 918 (Mansfield, J., dissenting).

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1 (continued)
suspension of any benefits," 29 C.F.R. §2520.102-3(1), which encompasses "claims which are denied in whole or in part." *Id.* at subsection (s). See also *id.* at subsection (t)(2); 29 C.F.R.§2560.503.1 (e)(1).

Congress, in enacting these disclosure requirements for pension plans, acted with considerable experience in other areas of federally-mandated disclosure. For example, Congress' efforts to regulate securities[2] evince a "fundamental purpose ... to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963). Such a disclosure statute must be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes." *Id.* at 195. See, also, *Touche Ross & Co. v. Securities & Exchange Commission*, 609 F.2d 570, 580 (2nd Cir. 1979). Another federal disclosure law, the "Truth-in-Lending Act (15 U.S.C, §§1601 *et seq)* reflects a transition in congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose.' " *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 377 (1973). Thus the Act is "designed to protect those with the least intelligence ..." *Grey v. European Health Spas, Inc.*, 428 F.Supp. 841, 846 (D. Conn. 1977) (Newman, J.); and, therefore, "its terms must be construed in liberal fashion if the underlying Congressional purpose is to be effectuated." *N.C. Freed Co., Inc. v. Board of Governors of Federal Reserve System*, 473 F.2d 1210, 1214 (2nd Cir. 1973).

Like other federal disclosure laws, ERISA too must be interpreted to effectuate Congress' insistence that companies and employee benefit plans like respondents "reasonably apprise such participants and beneficiaries

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[2]This Court has enumerated these regulatory statutes as the Securities Act of 1933, 15 U.S.C. §77a; the Securities Exchange Act of 1934, 15 U.S.C. §78a; the Public Utility Holding Company Act of 1935, 15 U.S.C. §79; the Trust Indenture Act of 1939, 15 U.S.C. §77 aaa; and the Investment Company Act of 1940, 15 U.S.C. §80a-1 *et seq. Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 & n. 15, (1972).

of their rights and obligations under the plan."[3] 29 U.S.C. §1022(a)(1). To fulfill Congress' "philosophy of full disclosure," *SEC v. Capital Gains Research Bureau, supra*, and to eliminate the conflict between the Second Circuit's excessively restrictive view of ERISA's disclosure requirements and this Court's view of similar federal statutes, this Court should grant the writ of certiorari to review the judgment below.

2. THE DECISION BELOW RESTRICTED THE PROCEDURAL PROTECTIONS OF 29 U.S.C. §1133 AND NULLIFIED A REGULATION OF THE SECRETARY OF LABOR, 29 C.F.R. §2520.102-3(t)(2).

Title 29 U.S.C. §1133 provides that, where a pension plan has denied a participant's request for benefits, the plan must provide written notice of such denial, including statement of reasons, and for a reasonable opportunity for full and fair review of the decision. Without statutory basis, the majority held that these procedural protections are inapplicable to the denial of a requested mode of payment. As Judge Mansfield stated in dissent:

> The Schiavone plan also violated the procedural protections provided in §503 of the Act, 29 U.S.C. §1133, by failing to give Pompano written notice of his denial and an opportunity for a full and fair review. (footnote omitted) The majority limits §503 to a denial of benefits, and holds that written notice and an opportunity for review are not required for the denial of a requested mode of payment. The rationale for

[3]The Schiavone pension plan summary certainly did not present the availability of the lump-sum option "in a manner that an average and reasonable worker can understand intelligently." H. Report No. 93-533, 1974 U.S. Code Cong. & Admin. News, *supra;* 29 C.F.R. §2520.102-2(a).

such a distinction escapes me, since the regulations mandate §503's procedural safeguards whenever "a claim for a (pension, welfare) benefit is denied in whole *or in part.*" 29 C.F.R. §2520.102-3(t)(2) (emphasis added). The denial of the requested lump sum payment, which clearly reduced the value to Pompano of his pension, certainly constitutes a partial denial of his claim. Moreover, the legislative history of §503 reveals that Congress was concerned with procedures for resolving and reviewing "*disputes* between the plan administrator and participants or beneficiaries," H.R. Rep. No. 93-1280, 93d Cong. 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad News 5038, 5108 (emphasis added), which would encompass more than the outright denial of all benefits. Finally, §503 must be interpreted in light of ERISA's strong concern with ensuring strict plan compliance with the Act. Accordingly, I would hold that Schiavone violated §503 of the Act. See *Frary v. Shorr Paper Products, Inc.*, 494 F.Supp. 565 (N.D. Ill. 1980), where the court held that the wrongful denial of a participant's request for a lump sum payment of benefits violated "his rights under the terms of the plan" (29 U.S.C. §1132(a)(1)(B) and ordered the lump sum payment be made. App. pp. 15A-17A. 680 F.2d at p. 919.

The decision below removes effective and important Congressionally-mandated procedural protections for pensioners which were designed to eliminate unnecessary suits in the federal courts. Cf. e.g. *Anderson Brothers Ford v. Valencia*, 452 U.S. 205 (1981). In this era of ever increasing burdens on the federal judiciary, Congressional attempts to reduce litigation should not be thwarted.

The need to prevent unnecessary litigation from reaching the federal courts requires the grant of certiorari to review the judgment below.

3. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS AS TO THE PROPER INTERPRETATION OF 29 U.S.C. §1132(a).

Despite the admitted failure of the pension plan committee to keep written records of its meetings and decisions, as required by the plan, the majority below held that this violation of the plan's term gave rise to no claim under 29 U.S.C. §1132(a), which authorizes suit by a plan participant to enforce the terms of the plan. The majority below held that such violation must be causally related to a decision to deny benefits in order for the plan participant to enforce the terms of the plan. Such a requirement does not appear in the statute, nor in the decided case law.

Judge Mansfield stated in dissent:

> Finally, I would also hold that Schiavone's failure to maintain written records, expressly required by the terms of the plan, is a violation of the Act that is actionable under §502(a)(3), 29 U.S.C. §1132(a)(3). The majority concedes implicitly that the district court erred in characterizing §502(a)(3) as merely conferring standing by stating, in an attempt to sidestep this clear violation, that "there is no causal relationship between the conceded failure of the Committee to keep written records of their proceedings and the decision it made to deny appellant a lump sum benefit." Maj. Op. p. 8, *supra*. With all due respect, this explanation, offered without any

authority and devoid of any basis in the statute, is unsupportable. As noted earlier, ERISA expressly authorizes compliance suits independent of any claim for benefits, and such suits have been brought, for example, to prevent possible future violations, to challenge various aspects to a new plan, and to object to an amendment to a plan that may affect the future eligibility of unspecified participants. See note 2, *supra.* [citing *Lechner v. National Benefit Fund for Hospital and Health Care Employees,* 512 F.Supp. 1220 (S.D.N.Y. 1981) (suit by non-claimant to prevent possible future violations); *International Ass'n of Bridge, Etc. v. Douglas,* 646 F.2d 1211 (7th Cir. 1981) (suit under 29 U.S.C. §1132(a)(1)(B) challenging plan amendment that *might* affect unspecified future participants); *Corley v. Hecht Co.,* 530 F.Supp. 1155 (D.D.C. 1982) (misleading plan summary violates disclosure requirements of 29 U.S.C. §1022(a)(1); *Janowski v. International Brotherhood of Teamsters Local No. 710,* 500 F.Supp. 21 (N.D. Ill. 1980) (challenging various aspects of new plan)] The majority's holding engrafts onto §502 a requirement that the alleged violation of ERISA must be "causally related" to some denial of benefits. Because this can be done only by disregarding the clear terms of the Act, its legislative history and existing case law, I decline to follow that course. App. p. 17A. 680 F.2d at 919.

In *Landro v. Glendenning Motorways, Inc.,* 625 F.2d 1344, 1356 (8th Cir. 1980),[4] the court explained

"... §1132(g), like the rest of ERISA, is remedial legislation that should be construed liberally in favor of those persons it was meant to

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[4]In *Landro,* the Court enforced the terms of the pension plan.

benefit and protect, namely, participants in and beneficiaries under covered pension and welfare plans; persons, in short, like appellees, who are specifically permitted by §1132(a) and (f) to sue in the federal courts to enforce their rights under their pension plans."

The majority's decision creates a conflict, as to ERISA's interpretation, between the Second Circuit and the Seventh and Eighth Circuits. This conflict justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully Submitted

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